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United States District Court
Eastern District of Washington
Honorable Salvador Mendoza, Jr.

United States,

Plaintiff,

v.

James Dean Cloud,

Defendant.

No. 1:19-CR-2032-SMJ-1

Rule 29 Motion for Partial
Judgment of Acquittal; Rule 33
Motion for New Trial

July 18, 2022 – 6:30 p.m.

Yakima—Without Argument

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I. Introduction¹

The Government's case against James Cloud unfolded in one courtroom, but it felt like two trials—one a picture of clarity, the other a picture of chaos.

At Jon's house, the Government laid out a clear narrative about James's role in the June 8 carjacking, kidnapping, and assault. Natasha placed James and Donovan in Jon's backyard minutes before the crimes occurred; Jon identified James as the man who pointed a shotgun at him; Nancy corroborated Jon; police recovered Donovan's prints from Jon's truck; and police located Jon's truck near where the Clouds were seen. The evidence against James was detailed, credible, and convincing.

At Dobie's house, the Government laid out a contradicting, inferential mess. Its #1 eyewitness (Morris) didn't see any murders; Natasha didn't see the house murders,² but exculpated James for the truck murders³; and Lindell not only exculpated James for the truck murders, but also agreed with Natasha that Morris was

¹ Throughout trial, the parties referred to several witnesses on a first-name basis. For this motion, James does the same; he also refers to select others on a first-name basis (e.g., Morris) for ease and consistency.

² The house murders embrace the following counts: 1) first-degree murder of Catherine (Count 10); 2) use of a gun during Catherine's murder (Count 11); 3) first-degree murder of Michelle (Count 12); and use of a gun during Michelle's murder (Count 13).

³ The truck murders embrace the following counts: 1) first-degree murder of Dennis. (Count 7); 2) use of a gun during Dennis's murder (Count 8); 3) first-degree murder of Thomas (Count 14); and use of a gun during Thomas's murder (Count 15).

1 the blue-shirted, shotgun-toting man who nearly killed him—wholly undercutting what
2 the Government promised the jury (and the Court) the evidence would show.

3 One moment captured this mess perfectly: when the Government took time
4 during rebuttal to discredit its own eyewitnesses. Remarkable. This mess means the
5 verdict’s murder convictions don’t survive post-trial scrutiny. Here’s why:

6 *First*, under Rule 29, the Government failed to prove premeditation for the
7 house murders with near certitude.⁴ Without a single eyewitness to say who-shot-who,
8 the Government built its case against James on an inferential chain tied to shooting
9 order—that is, Dobie got killed first during an unplanned argument, which meant
10 Michelle and Catherine got killed next during a premeditated cover-up.

11 This chain assumes Dobie got killed first—something the Government doesn’t
12 know. It’s guessing. Even “strong suspicion[s]” are “no substitute of guilt beyond a
13 reasonable doubt” under Rule 29, and the Government offers nothing more than
14 suspicions. *U.S. v. Jones*, 713 F.3d 336, 347 (7th Cir. 2013); *see also U.S. v. Katakis*, 800

15
16 ⁴ During the jury instruction conference, the Government took issue with “this language about
17 ‘near certitude,’” noting it “sounds different” than proof beyond a reasonable doubt. (ECF No.
18 666 at 9) (Transcript–Feb 22 pretrial hearing). The implication is this phrase (near certitude)
19 incorrectly captured the Government’s burden. Not so. The Ninth Circuit didn’t divine this
phrase from thin air; it pulled the phrase from the Supreme Court. *See U.S. v. Velasquez*, 1 F.4th
1132, 1137 (9th Cir. 2021) (citing *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (“At the same time
by impressing upon the factfinder the need to reach a subjective state of *near certitude* of the guilt
of the accused, the standard symbolizes the significance that our society attaches to the criminal
sanction and thus to liberty itself.”) (emphasis added)).

1 F.3d 1017, 1025 (9th Cir. 2015) (affirming judgment of acquittal since the
2 Government’s evidence lacked a “critical link in the logical chain of inference”).

3 Under Rule 33’s more-relaxed standard, the Court gets to consider trial errors,
4 including the exclusion of James’s evidence rebutting premeditation—namely, records
5 showing he got shot shortly before Medicine Valley, making it reasonable for him to
6 show up armed for protection, not aggression.

7 *Second*, under Rule 29, the Government failed to prove James committed the
8 house murders with near certitude. Once again, the Government built its case on an
9 inferential chain: Michelle and Catherine got killed with a rifle, and since a rifle was
10 consistently seen in James’s hands, he’s the shooter. This chain holds only if there was
11 one rifle at Medicine Valley, which wasn’t the case; there were multiple rifles—so says
12 the Government’s own witnesses.

13 Beyond the one-rifle problem, James wasn’t the only one consistently seen with
14 a rifle that day; Donovan was too, including when it mattered most—right after the
15 shootings, as he ran towards Morris and Natasha all worked up and breathing hard. At
16 best, the Government’s evidence creates equipoise, which falls short under Rule 29’s
17 deeper audit for circumstantially-built cases. See *U.S. v. Coplan*, 703 F.3d 46, 69 (2d
18 Cir. 2012) (Noting “if the evidence viewed in the light most favorable to the
19 prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a

1 theory of innocence, then a reasonable jury must necessarily entertain a reasonable
2 doubt” under Rule 29).

3 Under Rule 33, the Court gets to consider the credibility of the Government’s #1
4 witness: Morris, the man who left the stand with his credibility in shambles. When the
5 credibility of a Government witness gets that bad, courts grant new trials. *See, e.g., U.S.*
6 *v. Capati*, 980 F. Supp. 1114, 1134 (S.D. Cal. 1997) (granting new trial because the
7 Government’s theory, which was “based so heavily on the incredible testimony of one
8 witness, can in the end be no better than the discredited witness who gave it birth.”).

9 **Third**, under Rule 29, the Government failed to prove James aided in the house
10 murders with near-certitude. At best, the Government’s evidence placed James near
11 the shootings, but mere presence isn’t enough to convict. *See, e.g., U.S. v. Goldtooth*,
12 754 F.3d 763, 768-69 (9th Cir. 2014) (noting “mere presence at the scene does not an
13 aider and abettor make”). Nor is evidence that James dragged Dobie’s body, as that’s
14 more akin to accessory-after-the-fact (§3), which the Government didn’t charge.

15 Under Rule 33’s more-relaxed standard, little changes.

16 **Fourth**, under Rule 29, the Government failed to prove James committed the
17 truck murders with near certitude. Here, the Government’s own witnesses tell
18 contradicting stories: the cooperating ones (Morris and David Hoffman) say James was
19 involved in the shootings, while the disinterested ones (Natasha and Lindell) say he

1 wasn't. That's equipoise, which doesn't survive Rule 29's deeper audit for
 2 circumstantially-built cases. *See Coplan, 703 F.3d at 69* (same as above).

3 Under Rule 33's more-relaxed standard, the Court gets to consider who came
 4 off as more credible on the stand—Morris, or Natasha and Lindell. It also considers
 5 trial errors, including when the Government was allowed to tell the jury (incorrectly)
 6 that Morris saw James shoot Tommy—twice.

7 ***Fifth***, under Rule 29, the Government failed to prove James aided in the truck
 8 murders with near certitude. Once again, the Government's witnesses contradict each
 9 other: the cooperating one said James talked about taking out the truck (showing he had
 10 murder on his mind), while the disinterested one said those words came from
 11 Donovan. That's equipoise, which isn't enough under Rule 29's deeper audit in
 12 circumstantially-built cases. It also shows no aiding liability, as James didn't share a
 13 "state of mind extending to the entire crime," which is what the Supreme Court looks
 14 for. *Rosemond v. U.S., 572 U.S. 65, 75-76 (2014)* ("That is because, as we will describe,
 15 an aiding and abetting conviction requires not just an act facilitating one or another
 16 element, but also a state of mind extending to the entire crime.").

17 Under Rule 33's more-relaxed standard, the Court again weighs in on who came
 18 across as more credible on the stand—Morris or Natasha.

19 Here are James's specific asks for both motions (laid out in the alternative):

- 1) enter Rule 29 acquittals for all the murders (without reaching Rule 33);

- 2) alternatively, enter Rule 29 acquittals for the house murders, then grant a new trial under Rule 33 for the truck murders;
- 3) alternatively, enter Rule 29 acquittals on premeditation for the house murders, then grant a new trial under Rule 33 for the remaining house murders, as well as the truck murders.

The reasons why are set forth below.

II. Background

For ease, James organized the background to match how evidence came in at trial: by witness. This background doesn't capture every moment from every witness—that's unnecessary. Instead, it focuses on Medicine Valley. There will be periodic references to pre- and post-Medicine Valley events, but only inasmuch as they shed light on the post-trial analysis.

A. What the Government promised.

It helps to begin with the Government's promises.⁵ During opening, it promised the jury evidence showing James murdered five people, and he did so with a rifle:⁶

24 | DNA evidence. But most importantly what you're going to hear is
25 | that on Saturday, June 8th of 2019, this man, James Dean Cloud,

⁵ Although this deviates from a witness-order format, these promises inform the Court's analysis under both Rule 29 and Rule 33.

⁶ ECF No. 693 at 310 (Transcript–Day 3).

1 murdered five unarmed individuals, and he shot all of them with
2 a .22-caliber Ruger rifle.

3 That was its promise. But as set forth below, the Government's evidence showed
4 something else entirely.

5 **B. Michael Peterson**

6 The Government opened with Michael Peterson; he offered little. Three days
7 before the June 8 shootings, Michael saw James and Donovan parked outside his
8 mother's house.⁷ They had guns, but Michael couldn't remember who had what.⁸

9 When James saw Michael, he walked over and introduced himself, telling Michael they
10 were waiting for help with a flat tire.⁹ That's it.

11 **C. Janet Hoptowit**

12 Next was Janet Hoptowit. Janet told the jury the following: 1) she owned the
13 property at 5151 Medicine Valley¹⁰; 2) she let Dobie live there rent-free¹¹; and 3) the
14 property "got a bit trashier" while he lived there.¹²

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16
17
18 ⁷ ECF No. 693 at 344 (Transcript-Day 3).

19 ⁸ ECF No. 693 at 345, 346 (Transcript-Day 3).

⁹ ECF No. 693 at 351 (Transcript-Day 3).

¹⁰ ECF No. 693 at 354 (Transcript-Day 3).

¹¹ ECF No. 693 at 355-56 (Transcript-Day 3).

¹² ECF No. 693 at 363 (Transcript-Day 3).

1 **D. Pat Lewis**

2 Pat Lewis felt like a character witness—the good kind. Although Pat is James’s
3 step-father,¹³ James refers to him as “Pops.”¹⁴ Pat told the jury James is an enrolled
4 Yakima tribal member¹⁵; he also said James lacked a stable family growing up, so he
5 spent more time than usual with his grandmother.¹⁶

6 **E. Michelle Sconawah**

7 Michelle Sconawah helped check the jurisdictional box, telling the jury James
8 possesses sufficient blood quantum to be a Yakama tribal member.¹⁷

9 **F. Julia Saluskin**

10 Julia Saluskin also helped check the jurisdictional box, telling the jury James
11 received tribal per capita checks, a benefit reserved for enrolled members.¹⁸

12 **G. Wyeth Wallace**

13 Wyeth Wallace finished checking the jurisdictional box, confirming Medicine
14 Valley falls within the Yakama Nation’s boundaries.¹⁹

15
16
17 ¹³ ECF No. 693 at 368 (Transcript–Day 3).

18 ¹⁴ ECF No. 693 at 370 (Transcript–Day 3).

¹⁵ ECF No. 693 at 369 (Transcript–Day 3).

¹⁶ ECF No. 693 at 371 (Transcript–Day 3).

19 ¹⁷ ECF No. 693 at 379 (Transcript–Day 3).

¹⁸ ECF No. 693 at 384–85 (Transcript–Day 3).

¹⁹ ECF No. 693 at 394 (Transcript–Day 3).

1 H. William Boyer

2 Sergeant William Boyer served as a foundational witness, so it makes sense he
3 spent some time on the stand. The Government used him to introduce crime scenes,²⁰
4 photos,²¹ and physical items.²²

5 But besides admitting exhibits and providing background, Sergeant Boyer offers
6 little to this motion. He wasn't present during the shootings, he never saw the Clouds
7 that day, and he didn't participate in any pivotal interviews.

8 Sergeant Boyer's testimony isn't wholly irrelevant, as he offered one fact that
9 informs James's Rule 33 motion: he described Dobie's as a "tactical nightmare" — a
10 location so packed with junk that there were many "places for a shooter to hide."²³

11 I. Troy Ribail

12 FBI agent Troy Ribail also served as a foundational witness. The Government
13 used him to introduce photos (e.g., a shirtless Donovan with "Savage Till Death"
14 tattooed across his chest),²⁴ as well as physical items (e.g., the .22-caliber rifle Morris
15 ditched in the canal).²⁵

16 _____
²⁰ ECF No. 693 at 414 (Transcript–Day 3) (introducing Medicine Valley).

17 ²¹ ECF No. 693 at 425 (Transcript–Day 3) (introducing truck photos).

18 ²² ECF No. 693 at 470-71 (Transcript–Day 3) (introducing Natasha's green bag).

19 ²³ ECF No. 693 at 433 (Transcript–Day 3). Since this is the background, James Cloud won't
unpack how Sergeant Boyer's "tactical nightmare" comment informs the Rule 33 analysis; he'll
save that analysis for the discussion section below.

²⁴ ECF No. 700 at 708 (Transcript–Day 4).

²⁵ ECF No. 700 at 717 (Transcript–Day 4).

1 But the most relevant information from Agent Ribail (at least for post-trial
2 motion purposes) came when James called him on direct. There, Agent Ribail told the
3 jury he did the following:

- 4 - ***He labeled Morris a liar.*** During various interviews, Agent Ribail repeatedly
5 accused Morris of dishonesty and withholding information.²⁶
- 6 - ***He confronted Morris with inconsistent evidence.*** Agent Ribail confronted
7 Morris with evidence that other witnesses ID'd him as a shooter.²⁷
- 8 - ***He collected evidence that inculpated Morris.*** Agent Ribail documented that,
9 according to Lindell, Morris was the blue-shirted shooter who shot him and
10 had the shotgun.²⁸
- 11 - ***He collected evidence that exculpated James.*** Agent Ribail documented that
12 Lindell excluded James as the person who shot Dennis and Thomas.²⁹

13 Those are the things Agent Ribail did. He also told the jury he was surprised by several
14 things Morris said on the stand. Among them:

- 15 - ***An unmentioned confession.*** Morris mentioned James purportedly confessed
16 to shooting Dobie Jack—news to Agent Ribail.³⁰
- 17 - ***Unmentioned time under a tarp.*** Morris mentioned he spent several minutes
18 during the post-shooting chaos sitting under a tarp by some wood stoves—
19 news to Agent Ribail.³¹

20 ²⁶ ECF No. 739 at 1411 (Transcript–Day 7).

21 ²⁷ ECF No. 739 at 1411 (Transcript–Day 7).

22 ²⁸ ECF No. 739 at 1417 (Transcript–Day 7).

23 ²⁹ ECF No. 739 at 1421-22 (Transcript–Day 7).

24 ³⁰ ECF No. 739 at 1422-23 (Transcript–Day 7).

25 ³¹ ECF No. 739 at 1425 (Transcript–Day 7).

- ***An unmentioned confrontation.*** Morris mentioned Thomas confronted one of the Clouds about knowing Dobie was around³²—news to Agent Ribail.
- ***An unmentioned friend.*** Morris mentioned Natasha was upset because she thought one of the shooting victims was “Chucky” from White Swan—news to Agent Ribail.³³

It’s revealing when the lead agent gets surprised by testimony from his #1 witness.

J. Morris Jackson

Morris served as the Government’s #1 witness, so there’s much to unpack from his testimony. The best way to view his statements is a table—the left column covering what Morris said on direct, the right column covering what changed on cross:

Testimony on Direct	Admission on Cross
<i>Drug use in morning.</i> Morris woke up on June 8 and used meth. ³⁴	<i>This was new.</i> Morris admitted he never went to bed the night before and also used cocaine and alcohol. He agreed he told the jury something different the day before. ³⁵
<i>Alcohol use at Medicine Valley.</i> Morris took a couple of drinks of Jim Beam with Michelle. ³⁶	<i>Admits to lying.</i> Morris admitted to lying to police about his alcohol use on June 8. ³⁷
<i>Weapons in car.</i> James and Donovan <i>each</i> had rifles—Morris couldn’t remember what they looked like, but “knew they were rifles.” ³⁸	

³² ECF No. 739 at 1425 (Transcript–Day 7).

³³ ECF No. 739 at 1426 (Transcript–Day 7).

³⁴ ECF No. 700 at 761 (Transcript–Day 4).

³⁵ ECF No. 717 at 865-66 (Transcript–Day 5).

³⁶ ECF No. 700 at 770 (Transcript–Day 4).

³⁷ ECF No. 717 at 867 (Transcript–Day 5).

³⁸ ECF No. 700 at 762-63 (Transcript–Day 4).

Testimony on Direct	Admission on Cross
Relationship with Dobie Jack. Morris referred to Dobie as his friend. ³⁹	Admits to lying. Morris admitted he “may have been lying” when he told police Dobie wasn’t his friend. ⁴⁰
Relationship with the Clouds. Morris knew James longer than Donovan. ⁴¹	Admits to lying. Morris admitted he told police the opposite—that is, he knew Donovan better than James. ⁴²
Reason for Going to Medicine Valley. Morris went to buy “some dope from Dobie.” ⁴³	
Who wore what. Couldn’t remember what James wore; Donovan wore “darker colors,” not a white tank top. ⁴⁴	
Weapons in house. James and Donovan <i>each</i> had rifles (or <i>long</i> guns) inside Dobie’s game room. ⁴⁵	Memory gets fuzzy. Morris didn’t remember telling the FBI the opposite during a recorded interview—that is, Donovan had a rifle inside Dobie’s game room, but James did not. ⁴⁶ Morris also couldn’t remember telling the FBI—in a recorded interview—that he didn’t know who had the .22 rifle. ⁴⁷
Drug use at Medicine Valley. Morris sat in the Blazer with Natasha and smoked meth. ⁴⁸	
Morris enters the game room. After waiting in the Blazer, Morris went to the game room and	Getting things confused. Morris didn’t remember telling the FBI the opposite during a

³⁹ ECF No. 700 at 763 (Transcript–Day 4).

⁴⁰ ECF No. 717 at 872-73 (Transcript–Day 4).

⁴¹ ECF No. 700 at 759 (Transcript–Day 4).

⁴² ECF No. 717 at 871 (Transcript–Day 5).

⁴³ ECF No. 700 at 766 (Transcript–Day 4).

⁴⁴ ECF No. 700 at 772 (Transcript–Day 4).

⁴⁵ ECF No. 700 at 772 (Transcript–Day 4).

⁴⁶ ECF No. 717 at 875 (Transcript–Day 5).

⁴⁷ ECF No. 717 at 875 (Transcript–Day 5).

⁴⁸ ECF No. 700 at 774 (Transcript–Day 4).

Testimony on Direct	Admission on Cross
<i>believed</i> “they” (James, Donovan, and Dobie) were talking about gas, but didn’t clarify who was doing the talking—or arguing. ⁴⁹ James and Dobie then joked about Morris coming to check on them at Natasha’s behest. ⁵⁰	recorded interview—that is, Donovan was the one joking about Morris coming to check on them at Natasha’s behest. When confronted about this inconsistency, Morris admitted he gets James and Donovan confused when it comes to who did what. ⁵¹
<i>Morris returns to the Blazer.</i> Morris left the game room, returned to the Blazer, and waited with Natasha for an unknown time period. ⁵²	
<i>Morris hears something.</i> While waiting in the car and listening to music loudly, Morris thought he heard a gunshot coming from the west—away from Dobie’s residence. ⁵³	
<i>What Morris sees next.</i> Donovan ran from the property, jumped the fence, entered the Blazer, and rammed it through the gate. He was “worked up” and “breathing really hard,” claiming “Dobie was gone.” ⁵⁴	
<i>The looting begins.</i> Donovan directed Morris and Natasha to loot the place. He didn’t see James. ⁵⁵	
<i>James seen with one of two rifles.</i> Morris eventually saw James, who carried a .22 rifle—one of two from the Blazer. ⁵⁶	
<i>Entering Dobie Jack’s bedroom.</i> James purportedly told Morris to “get something”	<i>This was new.</i> Morris couldn’t recall if he told his attorney, the FBI, or the prosecutors about

⁴⁹ ECF No. 700 at 776 (Transcript–Day 4).

⁵⁰ ECF No. 700 at 776-77 (Transcript–Day 4).

⁵¹ ECF No. 717 at 876 at 876 (Transcript–Day 5).

⁵² ECF No. 700 at 778 (Transcript–Day 4).

⁵³ ECF No. 700 at 778 (Transcript–Day 4).

⁵⁴ ECF No. 700 at 779 (Transcript–Day 4).

⁵⁵ ECF No. 700 at 780 (Transcript–Day 4).

⁵⁶ ECF No. 700 at 780-81 (Transcript–Day 4).

Testimony on Direct	Admission on Cross
from Dobie's bedroom. He entered the bedroom, used a cellphone as a flashlight, and then ran into Donovan, who now had a pistol as well. ⁵⁷	using a cell phone as a flashlight during seven different interviews and two dress rehearsals. ⁵⁸
Searching Dobie. While looking for gas, James and Morris returned to the game room. Once there, James directed Morris to search Dobie's pockets—his pockets were already pulled out. ⁵⁹	This was new. Morris was confronted with a prior recorded statement where he told police he didn't even know if Dobie was alive—he couldn't remember making that statement. ⁶⁰ Morris insisted Dobie was wearing bib overalls, though photos show otherwise. ⁶¹ Morris thought someone took the time to remove these bib overalls. ⁶²
Alone time under the tarp. After exiting the game room, Morris sat under a tarp by some kitchen stoves for 5-10 minutes. ⁶³	This was new. Morris admitted he never told his attorney, the FBI, or the prosecutors about his alone time with the stoves during seven different interviews and two dress rehearsals. ⁶⁴
The truck arrives. While Morris searched the property for gas, a truck pulled up. He turned them away. ⁶⁵	
Morris sees multiple rifles. After the truck left, he saw Donovan carrying multiple rifles. James purportedly told Morris to shoot who came down the driveway. ⁶⁶	Confirms there were multiple guns. Morris confirmed seeing "a whole bunch of guns" being carried out of Dobie's house (5 or 6 or more). ⁶⁷

⁵⁷ ECF No. 700 at 782-83 (Transcript-Day 4).

⁵⁸ ECF No. 717 at 861-62 (Transcript-Day 4).

⁵⁹ ECF No. 700 at 785-86 (Transcript-Day 4).

⁶⁰ ECF No. 717 at 852 (Transcript-Day 5).

⁶¹ ECF No. 717 at 853-54 (Transcript-Day 5).

⁶² ECF No. 717 at 857 (Transcript-Day 5).

⁶³ ECF No. 700 at 786 (Transcript-Day 4).

⁶⁴ ECF No. 717 at 854-55 (Transcript-Day 5).

⁶⁵ ECF No. 700 at 789 (Transcript-Day 4).

⁶⁶ ECF No. 700 at 790 (Transcript-Day 4).

⁶⁷ ECF No. 717 at 877 (Transcript-Day 5).

Testimony on Direct	Admission on Cross
<p><i>The truck returns.</i> Roughly 20 minutes later, the returns.⁶⁸ During that time, Morris saw James with a rifle and Donovan with a pistol—Morris was going to say more about what Donovan possessed, but he wasn't able to finish answering the question.⁶⁹</p>	
<p><i>Exchange with Thomas.</i> Thomas exited the truck, walked around the property, and then said he knew Dobie was there, as he just spoke to him on the phone.⁷⁰</p>	<p><i>This was new.</i> Morris admitted he never told his attorney, the FBI, or the prosecutors about his exchange with Thomas during seven different interviews and two dress rehearsals.⁷¹</p>
<p><i>Random Confession.</i> According to Morris, James told Thomas he killed Dobie.⁷²</p>	<p><i>This was new.</i> Morris admitted he never told his attorney, the FBI, or the prosecutors about James's purported confession during seven different interviews and one dress rehearsal.⁷³ Morris thought he brought it up during his final dress rehearsal with the Government on the Saturday before trial⁷⁴—Agent Ribail said otherwise.⁷⁵</p>
<p><i>Shifted on the truck shooting.</i> Morris claimed James and Donovan were shooting at the truck as it drove away. When asked who had a .22-caliber rifle, Morris said Donovan had the rifle—he then corrected himself after prompting from the Government to say it was James.⁷⁶</p>	<p><i>Didn't see any shootings.</i> Morris admitted he didn't see anyone get shot.⁷⁷</p>

⁶⁸ ECF No. 700 at 791 (Transcript–Day 4).

⁶⁹ ECF No. 700 at 793 (Transcript–Day 4).

⁷⁰ ECF No. 700 at 795 (Transcript–Day 4).

⁷¹ ECF No. 717 at 845-47 (Transcript–Day 5).

⁷² ECF No. 700 at 796 (Transcript–Day 4).

⁷³ ECF No. 717 at 843 (Transcript–Day 5).

⁷⁴ ECF No. 717 at 845 (Transcript–Day 5).

⁷⁵ ECF No. 739 at 1422-23 (Transcript–Day 7).

⁷⁶ ECF No. 717 at 821 (Transcript–Day 5).

⁷⁷ ECF No. 717 at 917 (Transcript–Day 5).

Testimony on Direct	Admission on Cross
<i>Natasha thought her friend was killed.</i> Morris said Natasha was “shaken up” because she thought the man who was shot was “Chucky,” a friend from White Swan. ⁷⁸	<i>This was new.</i> Morris couldn’t recall if he told his attorney, the FBI, or the prosecutors about “Chucky” during seven different interviews and two dress rehearsals. ⁷⁹
<i>The Jacksons and the Clouds load up.</i> Morris found keys to Michelle’s truck. ⁸⁰ The Clouds and the Jacksons got in—Donovan drove, James was in front-passenger, and the Jacksons were in the back. James had a rifle, Donovan had a pistol, but it’s unclear where the shotgun was. ⁸¹	<i>Getting things confused.</i> Morris stated he was seated in the back when they left Medicine Valley, but insists there wasn’t a dog in the back seat (there was). ⁸²
<i>A seat switch.</i> Donovan stopped the truck at Levi Culps’s house, where James and Morris switched seats. According to Morris, this is how he ended up with a rifle. ⁸³	
<i>Who had what gun.</i> After leaving the Silverado, Morris had a rifle, James had a shotgun, and Donovan had a pistol. ⁸⁴	
	<i>Plea benefit.</i> Morris acknowledged his cooperation means the Government won’t charge him with other crimes (e.g., shooting the truck with a shotgun). ⁸⁵
	<i>Accused of lying.</i> Morris admitted the FBI and other police repeatedly accused him of lying during his many interviews. ⁸⁶

⁷⁸ ECF No. 717 at 822 (Transcript–Day 5).

⁷⁹ ECF No. 717 at 859-60 (Transcript–Day 5).

⁸⁰ ECF No. 717 at 824 (Transcript–Day 5).

⁸¹ ECF No. 717 at 827 (Transcript–Day 5).

⁸² ECF No. 717 at 882 (Transcript–Day 5).

⁸³ ECF No. 717 at 829 (Transcript–Day 5).

⁸⁴ ECF No. 717 at 830 (Transcript–Day 5).

⁸⁵ ECF No. 717 at 893-94 (Transcript–Day 5).

⁸⁶ ECF No. 717 at 886 (Transcript–Day 5).

1 **K. David Hoffman**

2 David Hoffman testified about a handful of inculpatory statements James
 3 purportedly made when they were cellmates at FDC Sea-Tac. Mr. Hoffman told the
 4 jury he and James “grew up together.”⁸⁷ He also told the jury James made the
 5 following statements: 1) “he was there on five bodies”⁸⁸; 2) he shot a female in the
 6 arm⁸⁹; and 3) he shot one victim twice.⁹⁰ We also learned the following: 1) he has no
 7 agreement with the Government “at this point in time,” so Mr. Hoffman was
 8 testifying on his “own free will”⁹¹; 2) inmates at FDC Sea-Tac receive their discovery
 9 electronically, which is viewed on a non-private computer in the middle of the housing
 10 unit for all to see;⁹² 3) it’s hard to have private legal calls because the phones are
 11 located in the middle of the housing unit for all to hear⁹³; and 4) he lacked any personal
 12 knowledge about what happened at Medicine Valley.⁹⁴

13 **L. Natasha Jackson**

14 Natasha was supposed to shore-up Morris’s testimony about James’s role at
 15 Medicine Valley; she did anything but. She told the jury the following:

16 _____
 17 ⁸⁷ ECF No. 717 at 926 (Transcript–Day 5).

18 ⁸⁸ ECF No. 717 at 927-28 (Transcript–Day 5).

19 ⁸⁹ ECF No. 717 at 928 (Transcript–Day 5).

⁹⁰ ECF No. 717 at 928 (Transcript–Day 5).

⁹¹ ECF No. 717 at 939 (Transcript–Day 5).

⁹² ECF No. 717 at 933-34 (Transcript–Day 5).

⁹³ ECF No. 717 at 938 (Transcript–Day 5).

⁹⁴ ECF No. 717 at 946 (Transcript–Day 5).

- 1 - ***Who wore what.*** Morris wore a blue shirt and Donovan wore a white tank top.⁹⁵
- 2 - ***The Clouds brought two rifles, not one.*** Natasha knows the difference between
- 3 shotguns and rifles, and the Clouds brought two rifles with them in the Blazer,
- 4 not one.⁹⁶
- 5 - ***Morris wanted to go to Medicine Valley, not the Clouds.*** Donovan detoured to
- 6 Medicine Valley because Morris wanted to “get what Dobie owed him.”⁹⁷
- 7 - ***The Clouds entered Medicine Valley with two rifles, not one.*** After waiting
- 8 inside the Blazer for Morris, the Clouds entered Dobie’s property—each
- 9 brought a rifle.⁹⁸
- 10 - ***She saw James drag Dobie’s body.*** While retrieving items from Medicine Valley
- 11 at Donovan’s direction, Natasha saw James drag Dobie’s body toward the game
- 12 room. While doing so, he asked Natasha to help look for gas.⁹⁹
- 13 - ***Couldn’t recall seeing James armed.*** When asked whether James was armed
- 14 when dragging Dobie’s body, she couldn’t recall.¹⁰⁰
- 15 - ***Saw everyone head towards the truck.*** Natasha saw Donovan, James, and Morris
- 16 walk towards the truck with Thomas.¹⁰¹

16 ⁹⁵ ECF No. 717 at 962-63 (Transcript–Day 5).

17 ⁹⁶ ECF No. 717 at 966 (Transcript–Day 5).

18 ⁹⁷ ECF No. 717 at 1007 (Transcript–Day 5).

19 ⁹⁸ ECF No. 717 at 972 (Transcript–Day 5).

⁹⁹ ECF No. 717 at 975-76 (Transcript–Day 5).

¹⁰⁰ ECF No. 717 at 976, 1024 (Transcript–Day 5).

¹⁰¹ ECF No. 717 at 982 (Transcript–Day 5). Note: this contradicts Morris, who testified he hid behind a truck with Natasha while James and Donovan shot the truck. (ECF No. 717 at 820 – Transcript–Day 5).

- 1 - ***The Clouds were armed.*** Natasha thought James and Donovan were armed when
2 walking towards the truck.¹⁰²
- 3 - ***Morris ditched a rifle in the canal.*** Shortly before his arrest, Morris threw a rifle
4 in the canal and told Natasha to start running.¹⁰³
- 5 - ***Before the shootings, someone chased the Clouds in a car.*** Before the shootings,
6 Natasha rode with James and Donovan when a car chased them.¹⁰⁴
- 7 - ***The Clouds offered to buy gas.*** When the Clouds arrived to pick up the Jackson,
8 they offered to buy gas from the Jacksons to get them to White Swan.¹⁰⁵
- 9 - ***Saw Dobie mock Donovan.*** Natasha saw Dobie mock and laugh at Donovan,
10 which made him mad.¹⁰⁶
- 11 - ***Natasha wasn't loaded, but Morris was.*** Natasha said she wasn't phased by the
12 alcohol and meth she used, as she smoked and drank daily.¹⁰⁷ Morris, on the
13 other hand, was "pretty hyped up."¹⁰⁸
- 14 - ***Didn't see the initial shootings.*** Natasha didn't see who shot Dobie, Michelle,
15 or Catherine.¹⁰⁹
- 16 - ***Donovan ran to the Blazer with a hot rifle.*** After the first shootings, Donovan
17 ran to the Blazer with a rifle, which was "all hot." Then Donovan took the
18

19 ¹⁰² ECF No. 717 at 983 (Transcript-Day 5).

¹⁰³ ECF No. 717 at 992-93 (Transcript-Day 5).

¹⁰⁴ ECF No. 717 at 998 (Transcript-Day 5).

¹⁰⁵ ECF No. 717 at 1004 (Transcript-Day 5).

¹⁰⁶ ECF No. 717 at 1009-1010 (Transcript-Day 5).

¹⁰⁷ ECF No. 717 at 1014 (Transcript-Day 5).

¹⁰⁸ ECF No. 717 at 1014 (Transcript-Day 5) (removed verbal pause "you know" from quote).

¹⁰⁹ ECF No. 717 at 1015-16 (Transcript-Day 5).

1 Blazer, rammed it through Dobie's gate, and directed Morris and Natasha to
2 start grabbing items.¹¹⁰

- 3 - *Natasha didn't confuse Tommy for Chucky.* When Thomas exited the truck to
4 inspect the property, Natasha recognized him—she didn't confuse him for a
5 friend from White Swan, as Morris claimed.¹¹¹
- 6 - *Natasha excluded James as a shooter.* Natasha confirmed James didn't shoot at
7 the truck.¹¹²
- 8 - *Donovan wanted to shoot the truck, James said no.* As the truck approached
9 Medicine Valley, Donovan wanted to “take out the people in the black truck.”
10 James said “No fucker!” and told Donovan to calm down.¹¹³
- 11 - *Morris shot the truck.* Natasha corroborated Lindell's testimony—Morris shot
12 the truck with a shotgun.¹¹⁴

13 Of all the statements Natasha made, her final words weighed heavy. When the
14 Government asked Natasha if her exculpatory statements about James (and her
15 inculpatory statements about Morris) were the truth or simply an effort to get off the
16 witness stand, she doubled down: “they were true.”¹¹⁵

17 ¹¹⁰ ECF No. 717 at 1022-23 (Transcript-Day 5).

18 ¹¹¹ ECF No. 717 at 1029 (Transcript-Day 5). This contradicts Morris, who testified Natasha
19 thought confused Thomas H. for “Chucky,” a friend from White Swan. (ECF No. 717 at 822 –
20 Transcript-Day 5.)

¹¹² ECF No. 717 at 1032 (Transcript-Day 5).

¹¹³ ECF No. 717 at 1038-39 (Transcript-Day 5).

¹¹⁴ ECF No. 717 at 1039 (Transcript-Day 5).

¹¹⁵ ECF No. 717 at 1042-43 (Transcript-Day 5).

1 **M. Charity Davis**

2 Charity Davis offered little to help the Government's case. She testified James's
3 DNA was on a cigarette from Dobie's game room.¹¹⁶

4 **N. Lindell L.**

5 Lindell was also supposed to shore-up Morris's testimony about James's role at
6 Medicine Valley. But like Natasha, he did anything but. Lindell saw Dennis get shot by
7 a red-shirted male that was "short and stocky."¹¹⁷ The day after the shootings, he
8 participated in a FBI-administered line-up and excluded James as the red-shirted
9 shooter.¹¹⁸ Lindell also agreed with Natasha that Morris was the blue-shirted male who
10 "shot him and had the shotgun."¹¹⁹

11 **O. Jesus Arreguin**

12 The Government called Jesus Arreguin to impeach its own witness. That is,
13 Deputy Arreguin told the jury that when he interviewed Lindell at the hospital shortly
14 after the shootings, he couldn't remember which direction the birdshot came from.¹²⁰

15
16
17
18 ¹¹⁶ ECF No. 725 at 1089 (Transcript-Day 6).

19 ¹¹⁷ ECF No. 725 at 1105 (Transcript-Day 6).

¹¹⁸ ECF No. 725 at 1114 (Transcript-Day 6).

¹¹⁹ ECF No. 725 at 1114 (Transcript-Day 6).

¹²⁰ ECF No. 725 at 1125 (Transcript-Day 6).

P. Sigmund Menchel

Dr. Sigmund Menchel confirmed the cause of death for each victim—that is, they were all killed with a distance shot (i.e., 18 inches or greater) from a weapon other than a shotgun.¹²¹

Q. Jon V.

Jon offered no observations about Medicine Valley, but he did offer helpful observations about James, noting he apologized while collecting the keys to his truck.¹²² He also testified Donovan held a pistol to his son’s head.¹²³

R. Berdleen Cootes

Berdleen Cootes also offered no observations about Medicine Valley, but she did describe the Clouds—James was “awful polite,” while Donovan looked “weird” with “bugged out” eyes.¹²⁴

S. Alvin Cootes

Alvin Cootes confirmed a subtle, but important observation: when he saw the Clouds, James had a pistol clip in his waistband, but no gun.¹²⁵

¹²¹ ECF No. 725 at 1211, 1214-17 (Transcript–Day 5).

¹²² ECF No. 725 at 1257 (Transcript–Day 6).

¹²³ ECF No. 725 at 1249 (Transcript–Day 6).

¹²⁴ ECF No. 725 at 1273, 1277 (Transcript–Day 6).

¹²⁵ ECF No. 725 at 1283 (Transcript–Day 6).

1 **T. Shannon Prince**

2 Shannon Prince testified a fingerprint retrieved from the rearview mirror of
3 Jon's truck belonged to Donovan.¹²⁶

4 **U. Jeremy Wyatt**

5 Jeremy Wyatt undermined the idea James showed up to Medicine Valley with
6 ill-motives. He told the jury James and Dobie were friends, and that Dobie had
7 previously helped James with a car and money when he was "down-and-out" a few
8 years back.¹²⁷ Jeremy also confirmed James routinely visited Medicine Valley, and was
9 playing pool with Dobie the night before the shootings—they were "talking and
10 laughing together" late into the night.¹²⁸

11 **V. Deanna Leslie**

12 Deanna Leslie also undermined the idea James showed up to Medicine Valley
13 with ill-motives. She told the jury James and Dobie were friends, and that James
14 dropped off elk or deer meat to Dobie and Michelle the day before the shootings.¹²⁹

15 With the relevant facts laid out, James turns to the law.
16
17
18

19 ¹²⁶ ECF No. 739 at 1366-67 (Transcript-Day 7).

¹²⁷ ECF No. 764 at 1561 (Transcript-Day 8).

¹²⁸ ECF No. 764 at 1568 (Transcript-Day 8).

¹²⁹ ECF No. 764 at 1615 (Transcript-Day 8).

III. Discussion

A. Standard

The Due Process Clause “protects a defendant in a criminal case against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). This “beyond-a-reasonable-doubt standard” is “*not* irretrievably committed to jury discretion,” as is sometimes the impression. *Id.* at 317 n.10 (emphasis added). No, the law requires a trial court to independently audit a trial using two procedural mechanisms—the first is Rule 29; the second is Rule 33.

1. Rule 29

Under Rule 29, a court “must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” *Fed. R. Crim. P. 29(a)*.

Assessing whether sufficient evidence exists is a two-part query:

- 1) “a reviewing court must consider the evidence presented at trial in the light most favorable to the [government]”; and
- 2) a reviewing court determines “whether the evidence, so viewed, is adequate to allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.”

U.S. v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (cleaned up). During this inquiry, courts don’t weigh witness credibility. *See id.* at 1169-70.

1 While this two-part query applies to all Rule 29 audits, courts perform a deeper,
2 more-searching audit when the Government builds its case on circumstantial evidence.
3 *See, e.g., U.S. v. Jones*, 713 F.3d 336, 341 (7th Cir. 2013) (“Since this case turns on
4 whether the inferences leading to a guilty verdict based on circumstantial evidence
5 were reasonable or speculative, we must review the government’s evidence in
6 detail.”). “Entirely circumstantial cases are not unusual,” and “a verdict may be
7 rational even if it relies solely on circumstantial evidence.” *Id.* at 340. But “as the name
8 ‘circumstantial evidence’ suggests, the strength of a particular piece of evidence turns
9 on the specific circumstances that accompany that evidence.” *U.S. v. Glenn*, 312 F.3d
10 58, 70 (2d Cir. 2002); *see also Jones*, 713 F.3d at 339 (noting “the height of [Rule 29’s]
11 hurdle depends directly on the strength of the government’s evidence.”). And “as the
12 inferential leap between the fact and the proposition to be derived grows, the probative
13 value of the evidence diminishes.” *Glenn*, 312 F.3d at 70.

14 There’s sound logic in performing a deeper audit in circumstantially-built cases,
15 as a line exists “between reasonable and unreasonable inferences from circumstantial
16 evidence.” *Jones*, 713 F.3d at 340. While that line “is by no means a sharp one,” it’s
17 crossed when the Government proves its case “with conjecture camouflaged as
18 evidence.” *Id.* To keep the Government from crossing that line, a trial court’s deeper
19 audit must ensure “each link in the chain of inferences” is “sufficiently strong to avoid
a lapse into speculation.” *Jones*, 713 F.3d at 340.

1 Of all the scenarios where the Government could lapse into speculation, one
2 stands out: convicting someone through “guilt by association” under an aiding &
3 abetting theory. *See id. at 352* (“The prohibition on speculative inference based solely
4 on guilt by association or mere presence is *especially relevant* in aiding-and-abetting
5 cases....”) (emphasis added). It is long-settled the Government can’t survive a [Rule 29](#)
6 by simply placing the accused at a crime scene. *See id. at 347* (“Inferences cannot be
7 motivated by or made possible by speculation focused on a defendant’s presence or
8 association with criminals or their criminal activity.”); *see also U.S. v. Goldtooth*, 754
9 [F.3d 763, 768-69 \(9th Cir. 2014\)](#) (reversing under Rule 29 in robbery case because “an
10 aiding and abetting conviction requires a state of mind extending to the entire crime,”
11 and no rational juror could conclude as much).

12 There’s a clear takeaway from these cases: when the Government builds its case
13 on circumstantial evidence, it can’t speculate its way to a conviction by putting James
14 in the same place as Donovan. Instead, the Government needs to provide the jury with
15 “a sufficient evidentiary predicate” to show that, “beyond a reasonable doubt,” James
16 was *involved* in killing Catherine, Michelle, Thomas, and Dennis on June 8 in
17 Medicine Valley. [Glenn](#), 312 [F.3d at 70](#).

18 Beyond closely tracking inferential links, courts employ another protective
19 measure when auditing circumstantially-built cases under Rule 29: they watch for
evidentiary equipoise. That is, “if the evidence viewed in the light most favorable to

1 the prosecution gives equal or nearly equal circumstantial support to a theory of guilt
 2 and a theory of innocence, then a reasonable jury must necessarily entertain a
 3 reasonable doubt.” *U.S. v. Coplan*, 703 F.3d 46, 69 (2d Cir. 2012) (cleaned up); *see also*
 4 *U.S. v. Ayala-Garcia*, 574 F.3d 5, 11 (1st Cir. 2009) (“A judgment of acquittal based on
 5 equally viable prosecution and defense theories is required only where the evidence is
 6 in equipoise, or nearly so, even when viewed in the *government’s* favor.”) (emphasis in
 7 original). Or, put differently: a Rule 29 acquittal becomes required when the evidence
 8 as to guilt and innocence is a wash.¹³⁰

9 Rule 29’s heightened protections for circumstantially-built cases guard against
 10 two scenarios: 1) a jury convicting an accused even though the evidence is “insufficient
 11 to establish every element of the crime”; and 2) “where mere speculation, rather than
 12 reasonable inference, supports the government’s case.” *Goldtooth*, 754 F.3d at 768.

13 There’s another nugget about Rule 29 worth noting, as it plays a potential role in
 14 James’s post-trial request: if a court “deems the evidence insufficient as a matter of law
 15 to support a jury’s guilty verdict on a greater offense,” it may acquit on the greater
 16 offense and “enter a judgment of conviction on the lesser included offense.” *U.S. v.*
 17 *Cavanaugh*, 948 F.2d 405, 409 (8th Cir. 1991) (holding that if a court grants a judgment

18
 19 ¹³⁰ Of course, the Government “need not refute every possible hypothesis supporting a
 defendant’s innocence.” *U.S. v. Friedman*, 300 F.3d 111, 123 (2d Cir. 2002). But it “must do
 more than introduce evidence that is at least as consistent with innocence as with guilt.” *U.S. v.*
D’Amato, 39 F.3d 1249, 1256 (2d Cir. 1994).

1 of acquittal following a jury verdict of guilty, it may enter judgment of conviction on a
 2 lesser included offense); *see also U.S. v. Ellsworth*, 647 F.2d 957, 965 (9th Cir. 1981),
 3 *cert. denied*, 456 U.S. 944 (1982); *U.S. v. Wood*, 207 F.3d 1222, 1229 (10th Cir. 2000)
 4 (“When ruling on a motion for judgment of acquittal, a district court should consider
 5 not only whether the evidence would be sufficient to sustain a conviction of the offense
 6 charged, but also whether it would be sufficient to sustain a conviction on a lesser
 7 included offense.”). So, if the Court found insufficient evidence on premeditation
 8 (what’s needed for 1st-degree murder), it could enter a judgment of conviction on the
 9 lesser-included offense: 2d-degree murder.

10 With the procedure for a [Rule 29](#) audit established, let’s turn to Rule 33.

11 **2. Rule 33**

12 Under Rule 33, a court may “grant a new trial if the interest of justice so
 13 requires.” [Fed. R. Crim. P. 33](#) (a). Rule 33 operates much differently than Rule 29—
 14 the court’s “power to grant a motion for new trial is *much broader* than its power to
 15 grant a motion for judgment of acquittal.” *U.S. v. Alston*, 974 F.2d 1206, 1211 (9th Cir.
 16 1992) (citing 3 Charles Wright, *Fed. Practice & Procedure* §553)) (emphasis added). In
 17 considering a new trial, the court “need *not* view the evidence in the light most
 18 favorable to the verdict; [and] it may weigh the evidence and in so doing evaluate for
 19 itself the credibility of the witnesses.” *Alston*, 974 F.2d at 1211; *see also U.S. v.*
Washington, 184 F.3d 653, 658 (7th Cir. 1999) (for a Rule 33 motion, “the court may

1 reweigh the evidence, taking into account the credibility of the witnesses.”). In effect,
 2 the court “sits as a thirteenth juror.” *U.S. v. Capati*, 980 F. Supp. 1114, 1132 (S.D. Cal.
 3 1997) (citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982)). Sitting in this position, if the
 4 court finds the “evidence preponderates sufficiently heavily against the verdict that a
 5 serious miscarriage of justice may have occurred, it may set aside the verdict” and
 6 grant a new trial. *Alston*, 974 F.2d at 1211. A trial court possesses considerable
 7 discretion in granting a new trial, and its “judgment call” is afforded “an appreciable
 8 measure of respect” given the court’s “sense of the ebb and flow of the recently
 9 concluded proceedings.” *U.S. v. Baptiste*, 8 F.4th 30, 41 (1st Cir. 2021).

10 * * *

11 With both standards set out, the next question is how best to apply them. While
 12 there are many issues to cover during the Court’s deeper audit under Rule 29 and
 13 Rule 33, those issues fall fairly neatly into three categories:

- 14 1) the Government’s failure to prove premeditation with near certitude;
- 15 2) the Government’s failure to prove James shot anyone with near certitude;
 16 and
- 17 3) the Government’s failure to prove James aided the murders with near
 18 certitude.

19 Given these categories, a roadmap helps: begin with the house murders. Examine each
 category (i.e., premeditation, James as shooter, and James as aider)—first under

1 Rule 29's more-stringent standard, then under Rule 33's more-relaxed standard. Finish
2 with the truck murders, performing the same analysis.

3 **B. The house murders don't survive post-trial scrutiny.**

4 **1. Under Rule 29, the Government failed to prove premeditation for the
house murders with near certitude.**

5 To see why the Government presented insufficient evidence on premeditation,
6 it helps to return to the Government's theory on premeditation: James killed Dobie
7 first, but "to be frank," it didn't know why— "[h]ence, second-degree murder" for
8 Dobie.¹³¹ With Dobie dead, James now had an eyewitness problem, as "Michelle and
9 Catherine [were] still on the property."¹³² To address this eyewitness problem, James
10 killed both during a premeditated cover-up—hence, first-degree murder for Michelle
11 and Catherine. That's its theory.

12 This theory assumes many things, but one above all: Dobie got shot first. The
13 Government needed to prove shooting order because, otherwise, it can't say which
14 death should be charged as the unplanned killing (i.e., 2d-degree murder), and which
15 deaths should be charged as the cover-up killings (i.e., 1st-degree murder). The
16 Government assumed a heavy burden when it brought 1st-degree murder charges
17 against James for the deaths of Michelle and Catherine, and shooting order helped
18 make that lift possible.

19 _____
¹³¹ ECF No. 775 at 1665 (Transcript-Day 9).

¹³² ECF No. 775 at 1665 (Transcript-Day 9).

1 But almost no evidence shows Dobie got shot first. Let's tick through it:

2 *No eyewitnesses.* The Government presented no testimony from eyewitnesses
3 on who got shot first. Morris didn't see any house murders,¹³³ and Natasha didn't
4 know "who shot those people" either.¹³⁴

5 *DNA evidence.* The Government linked the Clouds' DNA to some cigarettes on
6 Dobie's pool table, which means little. Jeremy saw James playing pool and smoking
7 cigarettes with Dobie the night before the shootings,¹³⁵ and Morris saw James and
8 Donovan standing in the game room at some point before the shootings while talking
9 with Dobie.¹³⁶ This evidence doesn't establish shooting order.

10 *Toolmark evidence.* The Government found a spent .22 casing near Dobie's
11 body in the game room, and Dr. Menchel said a small-caliber bullet killed Dobie.¹³⁷
12 This also means little, as it doesn't establish shooting order.

13 So what did the Government rely on to claim —with near certitude—that Dobie
14 got shot first? Two things: location and time. That is, police found Dobie's body in the
15 game room near the Clouds' cigarettes and a .22 casing (location), which is the last
16 moment Morris saw Dobie alive (time). By connecting the Clouds to the last place (and
17

18 ¹³³ ECF No. 717 at 917 (Transcript–Day 5).

19 ¹³⁴ ECF No. 717 at 1015-16 (Transcript–Day 5).

¹³⁵ ECF No. 764 at 1562, 1565-66 (Transcript–Day 8).

¹³⁶ ECF No. 700 at 775-76 (Transcript–Day 4).

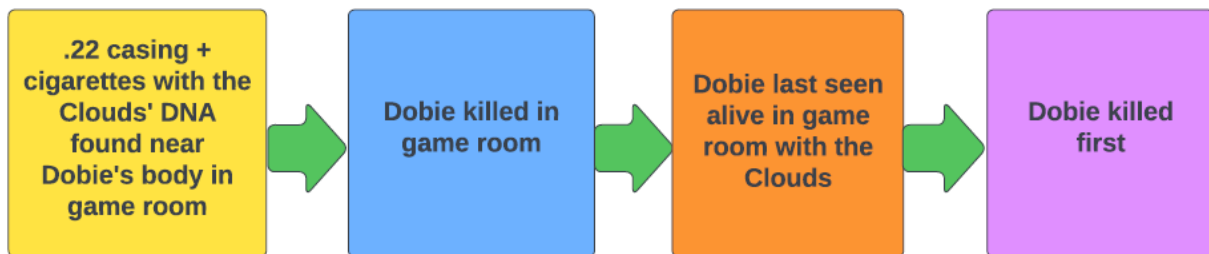
¹³⁷ ECF No. 775 at 1665 (Transcript–Day 9).

time) Dobie was seen alive, the Government created an inferential chain to say Dobie got shot first, which it explained to the jury during closing:

11 And John was found in the same place that Morris
 12 testified he saw him last or last alive, in close proximity to
 13 that shell casing, those cigarettes where Morris saw him having
 14 an argument with the defendants.
 15 I submit to you that, based on the proximity of the shell
 16 casing, him being in the last place he was seen alive with the
 17 defendant and his brother, that this is where John was killed
 18 and that he was killed first. Hence, second-degree murder.

Visually, the Government's inferential chain looks like this:

Inferential Chain for Premeditation



But as circuit courts caution, Rule 29 audits—especially deeper audits—must ensure “each link in the chain of inferences” is “sufficiently strong to avoid a lapse into speculation.” *Jones*, 713 F.3d at 340.

Here, this chain breaks in two places:

Dobie killed in the game room. The Government told the jury during closing there was “[n]o evidence in the record that [Dobie] was moved or dragged,” inferring

1 Dobie was killed in the same spot his body was found—the game room.¹³⁸ That’s false.

2 On direct, Natasha testified she saw James “dragging Dobie’s body *to* the game
3 room”¹³⁹— testimony the Government called “candid” during closing.¹⁴⁰ Morris
4 corroborated Natasha, telling the jury someone tampered with Dobie’s body
5 (specifically, took off his Carhartt coveralls and went through his pockets) after he
6 died.¹⁴¹ So, at best, the Government’s own witnesses describe Dobie getting moved to
7 the game room. There goes the first link, which is enough to damn this count for
8 Rule 29 purposes. *See U.S. v. Katakis*, 800 F.3d 1017, 1025 (9th Cir. 2015) (affirming
9 judgment of acquittal since the Government’s evidence lacked a “critical link in the
10 logical chain of inference”).

11 ***Dobie last seen alive with the Clouds.*** The Government told the jury during
12 closing that Morris left everyone in the game room, returned to the Blazer, and waited
13 with Natasha until, eventually, “all hell broke loose.”¹⁴² But in making this claim, the
14 Government glosses over a critical component: time. Neither Morris nor Natasha
15 testified how long they waited in the Blazer before seeing Donovan run towards them.
16 If Donovan ran towards the Blazer *immediately* after Morris left the game room, this

17 _____
¹³⁸ ECF No. 775 at 1665 (Transcript–Day 9).

18 ¹³⁹ ECF No. 717 at 975-76 (Transcript–Day 5) (emphasis added).

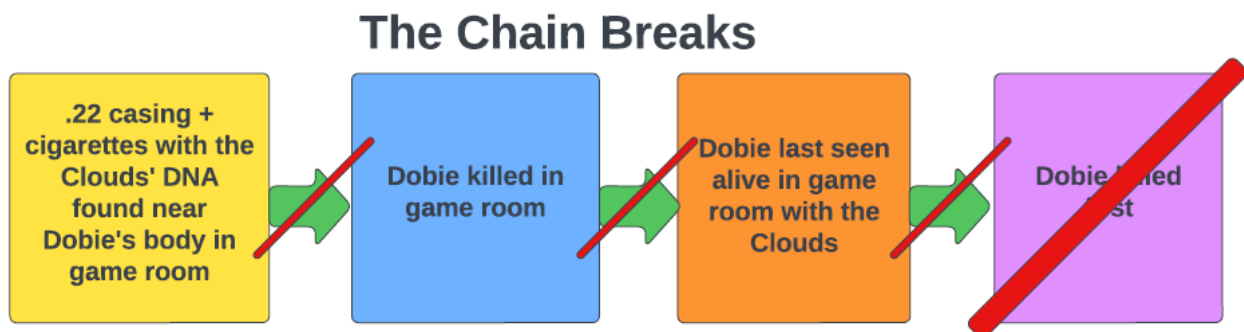
¹⁴⁰ ECF No. 775 at 1654 (Transcript–Day 9).

19 ¹⁴¹ ECF No. 717 at 857 (Transcript–Day 9) (“Question: So somebody came in and took his
Carhartts off after he was dead? Answer: Yeah.”).

¹⁴² ECF No. 775 at 1653 (Transcript–Day 9).

might support an inference Dobie got shot first. But the Government offered no evidence about how much time elapsed, be it five minutes, fifteen minutes, or longer. We just know Morris and Natasha sat in the Blazer listening to music and doing meth until they eventually saw Donovan running towards them — “worked up,”¹⁴³ “breathing really hard,”¹⁴⁴ and with a hot rifle in-hand.¹⁴⁵ There goes the second link.

Without time as a benchmark, and with Natasha saying Dobie’s body was moved *to* the game room, it’s impossible for the Government to say with near certitude that Dobie got shot first. Without a shooting order, the Government can’t prove who got killed during an unplanned argument (i.e., 2d-degree murder), and who got killed during a premeditated effort to remove eyewitnesses (i.e., 1st-degree murder). These proof problems break the inferential chain:



While the Government may have a “strong suspicion” Dobie got shot first, a “strong suspicion” is “no substitute of guilt beyond a reasonable doubt.” —even under

¹⁴³ ECF No. 700 at 779 (Transcript–Day 4).

¹⁴⁴ ECF No. 700 at 779 (Transcript–Day 4).

¹⁴⁵ ECF No. 717 at 1022-23 (Transcript–Day 5).

1 Rule 29’s deferential standard. *U.S. v. Jones*, 713 F.3d 336, 347 (7th Cir. 2013).
 2 (affirming the trial court’s Rule 29 grant, finding the circumstantial evidence amounted
 3 to nothing more than a “strong suspicion” of criminal activity, which cannot “satisfy
 4 the state of near certitude required” by the Supreme Court). To find otherwise would
 5 lower the Government’s burden, allowing it to prove-up counts “with conjecture
 6 camouflaged as evidence.” *Id.* at 340; *see also U.S. v. Del Toro-Barboza*, 673 F.3d 1136,
 7 1144 (9th Cir. 2012) (noting reasonable inferences must be “supported by a chain of
 8 logic, rather than mere speculation dressed up in the guise of evidence.”) (cleaned up).

9 Without premeditation, the house murders need to be reduced from 1st- to 2d-
 10 degree murder—a remedy Rule 29 allows. *See U.S. v. Wood*, 207 F.3d 1222, 1229 (10th
 11 Cir. 2000) (noting a court may enter conviction on a lesser-included offense).¹⁴⁶

12 **2. Under Rule 33, the Government failed to prove premeditation for the**
 13 **house murders with near certitude.**

14 The Court need not examine premeditation under Rule 33, as the Government
 15 offered insufficient evidence under Rule 29—the inquiry’s over. But if the Court

16 _____
 17 ¹⁴⁶ James anticipated arguing the affiliated gun counts would need to be tossed as well, as §924(c)
 18 convictions require predicate crimes of violence—something 2d-degree murder is not. *See U.S. v.*
 19 *Begay*, 934 F.3d 1033 (9th Cir. 2019) (finding 2d-degree murder isn’t a crime of violence). But
 yesterday, the Ninth Circuit walked that decision back, holding 2d-degree murder qualifies as a
 crime of violence because it involves “extreme recklessness,” which is a higher mens rea than
 “ordinary recklessness.” *U.S. v. Begay*, ___ F.4th ___, 2022 WL 1417535 (9th Cir. May 5, 2022) (en
 banc). While James disagrees with the majority and doesn’t concede this issue, he’s mindful the
 Court is bound by this latest turn in the ever-changing categorical world.

1 proceeds, little changes. The Government still can't prove shooting order, leaving
 2 "strong doubt" Michelle or Catherine were shot second and third (or vice versa) in a
 3 premeditated effort to remove witnesses. *See, e.g., U.S. v. Washington*, 184 F.3d 653,
 4 658-59 (7th Cir. 1999) (finding the weight of the evidence was against the verdict, and
 5 the court abused its discretion in declining to grant a new trial under Rule 33). Simply,
 6 the lack of evidence on premeditation weighs against the verdict.

7 Beyond the Government's conjecture on shooting order, another fact supports a
 8 new trial under Rule 33: the exclusion of medical records showing James was shot a few
 9 weeks before Medicine Valley. Here's why:

10 During trial, the Government introduced evidence James and Donovan showed
 11 up armed to Medicine Valley, suggesting ill-motives. Indeed, during the Rule 29
 12 hearing, the Court noted it looks bad when people show up armed to a house (from a
 13 premeditation standpoint):¹⁴⁷

14 16 THE COURT: Counsel, do you show up at houses taking two
 15 17 firearms and then putting them on and going into the house at --
 16 18 just for no reason?

17 Anticipating this issue, James offered a compelling response: a few weeks before
 18 Medicine Valley, James was shot during a drive-by. This drive-by, coupled with
 19

¹⁴⁷ ECF No. 739 at 1434 (Transcript-Day 7).

1 Natasha’s testimony the Clouds were chased by another car in White Swan,¹⁴⁸ as well
 2 as Sergeant Boyer describing Medicine Valley as a “tactical nightmare,”¹⁴⁹ would have
 3 allowed James to argue a sensible inference: if James just got shot, it’s reasonable for
 4 him to drive around White Swan with a gun for protection, not aggression.

5 The Government’s own witnesses corroborate this inference. A few days before
 6 Medicine Valley, Michael Peterson saw the Clouds with guns while they waited by the
 7 roadside for help with a flat tire.¹⁵⁰ Protection, not aggression.

8 But when James offered his self-authenticated medical records to pair with the
 9 testimony of Natasha, Sergeant Boyer, and Mr. Peterson, the Court excluded the
 10 records on relevance.¹⁵¹ Relevance is a low bar, as James need only show these records
 11 had “any tendency” to speak to a fact “of consequence”—here, whether he acted with
 12 premeditation. [Fed. R. Evid. 401](#) (2022). Respectfully, James believes the Court erred
 13 by finding the records irrelevant, and this error harmed James in two ways:

14 ***First***, it harmed James’s ability to rebut evidence on premeditation. For most lay
 15 jurors, people don’t randomly show up armed to another person’s house. These
 16 records pushed back on that point.

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 18
 19 ¹⁴⁸ ECF No. 717 at 998 (Transcript–Day 5).

¹⁴⁹ ECF No. 693 at 433 (Transcript–Day 3).

¹⁵⁰ ECF No. 693 at 344–46 (Transcript–Day 3).

¹⁵¹ ECF No. 764 at 1525 (Transcript–Day 8).

1 ***Second***, it harmed James’s credibility with the jury. During opening, defense
 2 counsel told the jury James was shot in the face and torso only a few weeks before
 3 Medicine Valley, which is why he obtained “some means of being able to protect
 4 himself out there from people who would want to do him harm” in White Swan.¹⁵²
 5 That was the defense’s promise, and that promise went unfulfilled.

6 This error—alone, or in conjunction with insufficient evidence on shooting
 7 order—serves as a basis for a new trial under Rule 33. *See* Moore’s Federal Practice –
 8 Criminal Procedure §633.02[2] (outlining the various grounds for a new trial under
 9 Rule 33, including evidentiary errors); *see also U.S. v. Ramirez-Rivera*, 800 F.3d 1, 34
 10 (1st Cir. 2015) (defendant entitled to new trial based on evidentiary errors during trial).

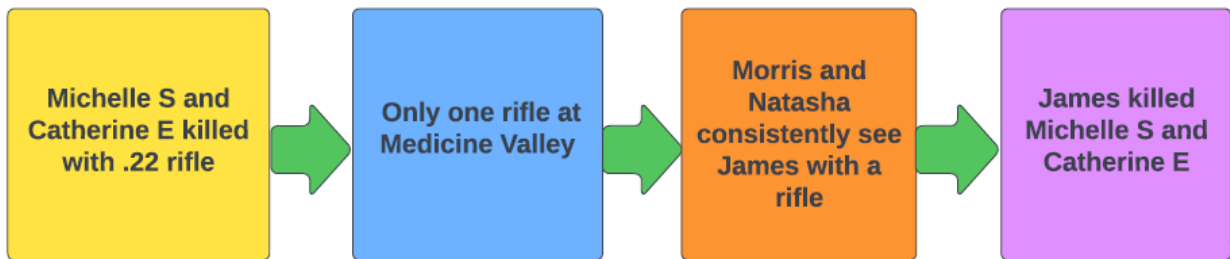
11 **3. Under Rule 29, the Government failed to prove James committed the**
 12 **house murders with near certitude.**

13 To see why the Government presented insufficient evidence on James shooting
 14 anyone, it again helps to return to its theory: Michelle and Catherine were killed with a
 15 rifle. And since there was only one rifle at Medicine Valley, which was consistently
 16 seen in James’s hands, it concluded he’s the shooter.¹⁵³ Visually, the Government’s
 17 inferential chain looks like this:

18
 19 ¹⁵² ECF No. 693 at 336 (Transcript–Day 3).

¹⁵³ ECF No. 775 at 1666 (Michelle killed with .22 retrieved from canal); 1667 (Catherine killed with a rifle); and 1666 (Morris saw James “consistently at Medicine Valley with a rifle”).

Inferential Chain for James as Shooter



This chain breaks in two places:

There was only one rifle. To make its case against James, the Government needed a closed universe of guns for the shootings at Medicine Valley—one pistol, one shotgun, and one .22-caliber rifle. By closing the universe, the Government added gravitas to each moment James had a rifle. It wasn't just *a* rifle, after all; it was *the* rifle.

The Government doubled-down on this closed universe, telling the jury if witnesses referred to multiple rifles at Medicine Valley, those witnesses likely used “rifle” as a catch-all for guns generally, just as Southerners call “every soda a ‘Coke.’”¹⁵⁴ It went on to claim the “only evidence that we have that other weapons were present is a shotgun.”¹⁵⁵

¹⁵⁴ ECF No. 775 at 1651 (Transcript–Day 9). An aside: undersigned counsel is also from the South, and Southerners don't collectively refer to all sodas as “Cokes”—especially in Texas, which is the home of Dr. Pepper (and 7-Up).

¹⁵⁵ ECF No. 775 at 1666 (Transcript–Day 9).

1 That's false. Natasha testified she knew the difference between shotguns and
2 rifles, and the Clouds brought *two* rifles with them in the Blazer, not one.¹⁵⁶ She also
3 said *both* Clouds entered Dobie's residence with rifles.¹⁵⁷

4 Morris said the same, testifying he couldn't remember what James and
5 Donovan's guns looked like, but "knew they were rifles."¹⁵⁸ In fact, Morris saw
6 Donovan with multiple rifles right after the shooting.¹⁵⁹ So even viewing the evidence
7 in the light most favorable to the Government, its own witnesses describe an open
8 universe of guns at Medicine Valley.

9 Another fact damages the Government's efforts to portray a closed universe of
10 guns: what police found. It would be persuasive if the Government's witnesses
11 described three guns at Medicine Valley, and police recovered three guns during the
12 investigation. That's tidy. But of the three guns the Government talk about at trial,
13 only one was found—the rifle. Police never found the pistol Donovan possessed during
14 the carjacking; and police never found the shotgun Morris possessed during the truck
15 murders. Police also never found the other rifles (plural) Donovan was carrying when
16 loading up the Blazer to leave. There goes the first link.

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19 ¹⁵⁶ ECF No. 717 at 966 (Transcript-Day 5).

¹⁵⁷ ECF No. 717 at 972 (Transcript-Day 5).

¹⁵⁸ ECF No. 700 at 762-63 (Transcript-Day 4).

¹⁵⁹ ECF No. 700 at 790 (Transcript-Day 4).

1 *James was consistently seen with a rifle.* The Government told the jury during
2 closing that James was seen “consistently in Medicine Valley with a rifle.”¹⁶⁰ Okay,
3 but so was Donovan. Donovan was seen driving to Medicine Valley with a rifle;
4 Donovan was seen walking into Dobie’s game room with a rifle; and Donovan was seen
5 carrying multiple rifles right after the shooting. In fact, Donovan was seen with a rifle
6 when it mattered most—immediately after Morris thought he heard a gunshot, running
7 towards Morris and Natasha all “worked up”¹⁶¹ and “breathing really hard.”¹⁶² So
8 even viewing the evidence in the light most favorable to the Government, its own
9 witnesses place rifles in the hands of both James and Donovan—rifles Morris couldn’t
10 describe. There goes the second link.

11 Beyond these broken links, the Government’s evidence creates equipoise, which
12 isn’t enough under Rule 29’s deeper audit for circumstantially-built cases. *See U.S. v.*
13 *Coplan*, 703 F.3d 46, 69 (2d Cir. 2012) (Noting “if the evidence viewed in the light
14 most favorable to the prosecution gives equal or nearly equal circumstantial support to
15 a theory of guilt and a theory of innocence, then a reasonable jury must necessarily
16 entertain a reasonable doubt” under Rule 29).

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18
19 ¹⁶⁰ ECF No. 775 at 1666 (Transcript–Day 9).

¹⁶¹ ECF No. 700 at 779 (Transcript–Day 4).

¹⁶² ECF No. 700 at 779 (Transcript–Day 4).

1 **4. Under Rule 33, the Government failed to prove James committed the**
 2 **house murders with near certitude.**

3 Like before, the Court need not examine who-shot-who for the house murders
 4 under Rule 33, as the Government offered insufficient evidence under Rule 29. But if
 5 the Court proceeds, things get worse for the Government. It still can't show a closed
 6 universe of guns, and it still can't show James possessed *the* rifle when it counts, as
 7 opposed *a* rifle. Those problems remain.

8 What gets worse is, under Rule 33, the Court gets to weigh witness credibility.
 9 *See U.S. v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992) (In considering a new trial, the
 10 court “need *not* view the evidence in the light most favorable to the verdict; [and] it
 11 may weigh the evidence and in so doing evaluate for itself the credibility of the
 12 witnesses.”). And since Natasha couldn't recall if James was armed after the shootings,
 13 that means the Government's case against James rested on the shoulders of Morris—
 14 its #1 witness.

15 What a liar.¹⁶³ Of all the eyebrow-raising moments from Morris's time on the
 16 stand, one stands out: on direct, Morris claimed (for the first time) James confessed to
 17 shooting Dobie. It's hard to imagine Morris self-inflicting a more credibility-damaging
 18 wound. He agreed to cooperate against James; he met with police a dozen times,
 19

¹⁶³ A bold statement, but when the Government's lead case agent repeatedly called Morris a liar, that's license for James to call him one as well.

1 detailing James’s purported involvement in the Medicine Valley murders; and he spent
2 hours rehearsing his testimony with the Government in the days leading up to trial.
3 Despite all those meetings and dress rehearsals, Morris never told police about James’s
4 purported confession—not once? Unbelievable.

5 To be fair, Morris thought he “had brought it up” during his dress rehearsal on
6 the Saturday before trial,¹⁶⁴ but Agent Ribail corrected the record—James’s purported
7 confession was news to him.¹⁶⁵ This moment, above all, captures Morris’s character—
8 when prison is on the line, he’ll trade truth for freedom.

9 It’s also hardly confidence-inspiring when the lead FBI agent repeatedly accused
10 the Government’s #1 witness of lying and withholding information.¹⁶⁶

11 When witness credibility gets this bad, courts grant new trials. *See, e.g., U.S. v.*
12 *Capati*, 980 F. Supp. 1114 (S.D. Cal. 1997). There, the Government charged Alberto
13 Capati with Hobbs Act robbery (among other offenses), and its case rested upon the
14 testimony of Jeffrey Diaz, the Government’s #1 witness. *Id.* at 1117 (referring to
15 Mr. Diaz as “the Government’s key witness”). Mr. Diaz was less-than-candid on the
16 stand—a point the court noticed. In fact, the court invoked a “familiar legal maxim,
17 *falsus in uno, falsus in omnibus*,” commenting that if “Diaz fabricated the most crucial
18

19 ¹⁶⁴ ECF No. 717 at 845 (Transcript–Day 5).

¹⁶⁵ ECF No. 739 at 1422–23 (Transcript–Day 7).

¹⁶⁶ ECF No. 739 at 1411 (Transcript–Day 7).

part of his testimony, it is difficult to imagine what aspect of Diaz’s testimony can be believed.” *Id.* at 1133. After pouring over the transcripts, the court was left with “a powerful impression that everything Diaz said was precisely what he thought the Government wanted him to say, true or false.” *Id.* at 1134. The court granted a new trial, finding those deep credibility issues were too much to ignore. *See id.* Simply, Diaz was a Government “yes” man—truth be damned.

Sounds familiar. When the Government asked Morris who had the rifle during the truck shootings, he initially said Donovan, but changed his answer in response to a follow-up question from the Government:¹⁶⁷

5	Q They were shooting at the truck as it was driving away
6	going down the driveway back towards Medicine Valley Road?
7	A Yes.
8	Q Could you tell what, if any, firearms Donovan had on him at
9	that point in time?
10	A Um, he had the .22 rifle.
11	Q That's Donovan.
12	A Oh, I'm sorry. Um, he had the 12-gauge.

With one follow-up, the Government put Morris back in line—a “yes” man, indeed.

Then there was Morris’s selective memory. When the Government asked questions, Morris exhibited an eidetic memory, answering every question the

¹⁶⁷ ECF No. 717 at 821 (Transcript–Day 5).

1 Government asked. But when James’s defense team asked questions, Morris became
2 awfully forgetful, stating he “couldn’t remember” what happened 47 times.

3 Morris’s memory got fuzzy during some opportune moments. Like when he
4 couldn’t remember telling police—during a *recorded* interview—that Donovan had a
5 rifle inside Dobie’s game room, but James did not;¹⁶⁸ or when he couldn’t remember
6 telling police—during a *recorded* interview—that he didn’t know who had the .22 rifle
7 when it mattered;¹⁶⁹ or when he couldn’t remember telling police—during a *recorded*
8 interview—that he didn’t know whether Dobie was alive.¹⁷⁰

9 Morris’s credibility weighs against the verdict on the house murders.

10 **5. Under Rule 29, the Government failed to prove James aided in the**
11 **house murders with near certitude.**

12 Even today, it’s unclear if the Government intended to assign aiding & abetting
13 liability to James for the house murders. It intended to do so for the truck murders,
14 formally charging James under §2 (aiding & abetting) in the last indictment.¹⁷¹ But
15 curiously, the Government declined to take the same formal steps for the house
16 murders. That says something.

18 ¹⁶⁸ ECF No. 717 at 875 (Transcript–Day 5).

19 ¹⁶⁹ ECF No. 717 at 875 (Transcript–Day 5).

¹⁷⁰ ECF No. 717 at 852 (Transcript–Day 5).

¹⁷¹ ECF No. 242 at 5, 7-8 (Third Superseding Indictment).

1 Nor did the Government argue James aided the house murders during closing.
2 In fact, the Government never uttered the words “aiding” or “abetting” until it talked
3 about the carjacking. That says something too.

4 While these charging decisions and closing tactics aren’t evidence, they convey
5 insight—specifically, the Government believed its evidence that James aided Donovan
6 was so soft, it was barely worth mentioning. At best, it showed two things: 1) James was
7 with Donovan before the shootings; and 2) Natasha saw James drag Dobie’s body to
8 the game room. Neither fact presents sufficient evidence for a conviction. Here’s why:

9 James’s presence with Donovan in the game room at some point before the
10 shootings doesn’t carry the day, for as courts have long held, “mere presence at the
11 scene does not an aider and abettor make.” *U.S. v. Goldtooth*, 754 F.3d 763, 768-69 (9th
12 Cir. 2014) (finding insufficient evidence for verdict based on aiding & abetting
13 liability); *U.S. v. Jones*, 713 F.3d 336, 352 (7th Cir. 2013) (“Simply put, our criminal
14 justice system does not tolerate the conviction and imprisonment of people based on
15 suspicion, speculation, and association with criminals. The government must present
16 direct or circumstantial evidence of each element of each charged offense,” and
17 “cannot fill the gaps with inferences of guilt by association or evidence of an
18 individual’s mere presence somewhere criminal activity may have occurred.”).

19 Similarly, James moving Dobie’s body *after* the shootings also doesn’t carry the
day, for as courts have long held, “an aiding and abetting conviction requires a state of

1 mind extending to the entire crime,” which necessarily includes “foreknowledge that
 2 the [murders were] to occur.” *Goldtooth*, 754 F.3d at 768. Moving a body *after* a murder
 3 better fits an “accessory after the fact,” which is a separate crime the Government
 4 didn’t charge. *See* 18 U.S.C. § 3 (Accessory after the fact).

5 **6. Under Rule 33, the Government failed to prove James aided in the**
 6 **house murders with near certitude.**

7 Like before, the Court need not examine whether James aided the house
 8 murders under Rule 33, as the Government offered insufficient evidence under
 9 Rule 29. But if the Court proceeds under Rule 33’s more-relaxed standard, little
 10 changes. It still can’t show James acted with the intent to facilitate 1st-degree murder;
 11 it can only show James was present.

12 **C. The truck murders don’t survive post-trial scrutiny.**

13 **1. Under Rule 29, the Government failed to prove James committed the**
 14 **truck murders with near certitude.**

15 During closing, the Government provided three reasons James killed Dennis and
 16 Thomas:

- 17 1) “the testimonies regarding the red shirt”;
- 18 2) “the proximity of Thomas and Dennis”; and
- 19 3) “what Morris testified he saw.”¹⁷²

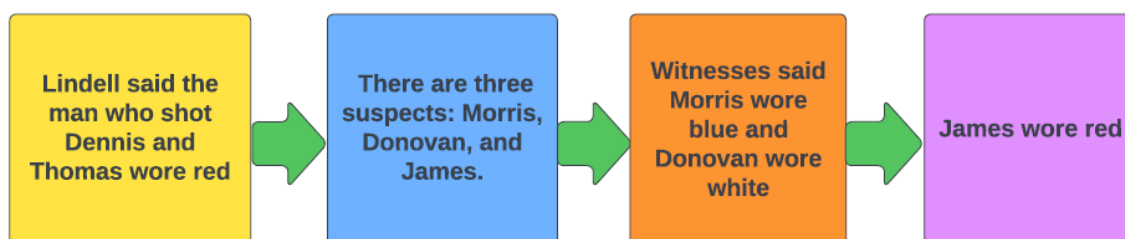
Each merits scrutiny, for the closer you look, the less you see.

¹⁷² ECF No. 775 at 1663 (Transcript–Day 9).

a. **The Government ignored evidence to claim James wore red.**

Lindell testified the man who shot Dennis and Thomas wore red,¹⁷³ but there's no testimony James wore red. So to link James to the red-shirted male Lindell saw, the Government used a "process of elimination,"¹⁷⁴ assembling quite the inferential chain:

Inferential Chain for James Wearing Red



To keep this chain connected, the Government needed consensus on what colors Donovan and Morris wore that day. Without it, the Government can't employ deductive reasoning to say James wore red. And therein lies the rub: there isn't consensus on who wore what. While everyone agrees Morris wore blue,¹⁷⁵ witnesses don't agree on what Donovan wore. Natasha said Donovan wore a white tank top;¹⁷⁶ meanwhile, Morris remembered Donovan wearing "darker colors."¹⁷⁷ Morris and Natasha didn't describe colors separated by a few degrees on the spectrum; white and

¹⁷³ ECF No. 725 at 1106

¹⁷⁴ ECF No. 775 at 1664 (Transcript-Day 9) (Government during closing: "I submit to you the man in the red shirt, by process of elimination, was the defendant.").

¹⁷⁵ ECF Nos. 717 at 832 (Morris saying he wore blue); 962 (Natasha saying Morris wore blue); 725 at 1114 (Lindell saying Morris wore blue).

¹⁷⁶ ECF No. 717 at 962-63 (Transcript-Day 5).

¹⁷⁷ ECF No. 700 at 772 (Transcript-Day 4).

1 dark are, quite literally, yin and yang—unless, of course, Donovan started out wearing
2 something darker (say, dark red) and then removed that shirt to reveal a white tank.

3 How can the Government explain this? Its two eyewitnesses disagree on the
4 color of Donovan’s shirt, and his shirt color is *the* fact that allows the Government to
5 argue James wore red. There goes this link.

6 **b. James’s proximity to Dennis and Thomas means little.**

7 The Government insists James was near Dennis and Thomas, so this helps show
8 he’s the red-shirted shooter. Not so. Natasha testified Donovan, Morris, and James
9 walked out to the truck with Thomas—so, all the suspects.¹⁷⁸ That helps little.

10 **c. Natasha contradicted what Morris saw.**

11 Here’s the Government’s best evidence that James shot Dennis and Thomas:
12 Morris claimed he saw James shooting at the truck as it pulled away from Medicine
13 Valley.¹⁷⁹ But let’s look closely at what Morris said: he testified Donovan had a .22 rifle
14 (sorry, 12-gauge) at that time,¹⁸⁰ but never said what gun James had at the time:

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19 ¹⁷⁸ ECF No. 717 at 982 (Transcript–Day 4).

¹⁷⁹ ECF No. 717 at 821 (Transcript–Day 5).

¹⁸⁰ ECF No. 717 at 821 (Transcript–Day 5).

Q They were shooting at the truck as it was driving away going down the driveway back towards Medicine Valley Road?

A Yes.

Q Could you tell what, if any, firearms Donovan had on him at that point in time?

A Um, he had the .22 rifle.

Q That's Donovan.

A Oh, I'm sorry. Um, he had the 12-gauge.

Q What firearm did you have on your person?

A Um, at that time I still had the -- the one gun that didn't shoot.

Q How about Natasha? What, if any, firearms did she have?

A She didn't have one.

Q What, if anything, happened after that -- the truck left?

The truck that was heading down the driveway that the man in the

In fact, Morris said who had what gun for everyone *but* James. He also admitted he never saw either Dennis or Thomas get shot;¹⁸¹ he claims to have just seen the aftermath as Thomas lay on the ground and Lindell drove the truck down the driveway. Given what Morris *didn't see* (anyone get shot), as well as an open universe of guns, it's impossible to say with near certitude that James possessed the murder weapon—even when viewing things favorably for the Government. It's guesswork, which isn't enough. *See, e.g., U.S. v. Valle*, 807 F.3d 508, 515 (2d Cir. 2015) (noting “specious

¹⁸¹ ECF No. 717 at 917 (Transcript–Day 5).

inferences are not indulged,” as “it would not satisfy the Constitution to have a jury determine that the defendant is *probably* guilty.”) (emphasis in original).

Then there’s Natasha, who contradicted Morris outright: James *didn’t* shoot at the truck.¹⁸² So one Government witness (the one with a reason to lie) says James shot at the truck, the other witness (the one inculcating her own uncle) says he didn’t.

That’s equipoise, which doesn’t survive Rule 29’s deeper inquiry for circumstantially-built cases. *See Coplan*, 703 F.3d at 69.

But in reality, the evidentiary scales aren’t balanced. There’s also Lindell, who participated in a FBI-administered line-up and excluded James as the red-shirted shooter.¹⁸³ He also agreed with Natasha that Morris was the blue-shirted male who “shot him and had the shotgun.”¹⁸⁴

With all these facts, it helps to take a step back and view them in a chart:

Evidence showing James shot Dennis and Thomas	Evidence showing otherwise
<i>Natasha on shirt colors:</i> Donovan wore white, ¹⁸⁵ while Morris wore blue. ¹⁸⁶	<i>Morris on shirt colors:</i> He wore blue, while Donovan wore “darker colors.” ¹⁸⁷ Couldn’t remember what James was wearing. ¹⁸⁸

¹⁸² ECF No. 717 at 1032 (Transcript–Day).

¹⁸³ ECF No. 725 at 1114 (Transcript–Day 6).

¹⁸⁴ ECF No. 725 at 1114 (Transcript–Day 6).

¹⁸⁵ ECF No. 717 at 962-63 (Transcript–Day 5).

¹⁸⁶ ECF Nos. 717 at 832 (Morris saying he wore blue); 962 (Natasha saying Morris wore blue); 725 at 1114 (Lindell saying Morris wore blue).

¹⁸⁷ ECF No. 700 at 772 (Transcript–Day 4).

¹⁸⁸ ECF No. 700 at 772 (Transcript–Day 4).

Evidence showing James shot Dennis and Thomas	Evidence showing otherwise
<i>Morris on who shot truck as it pulled away:</i> James. ¹⁸⁹	<i>Morris on who shot Dennis or Thomas:</i> Didn't see Dennis or Thomas get shot. ¹⁹⁰
<i>Morris on what gun Donovan had during truck shooting:</i> the .22-rifle (sorry, the 12-gauge). ¹⁹¹	<i>Morris on what gun James had during truck shooting:</i> Didn't say. ¹⁹²
<i>David Hoffman on James's involvement:</i> He shot a female in the arm and one person twice.	<i>Dr. Sigmund Menchel on shootings:</i> No female was shot in the arm with a rifle, which contradicts Mr. Hoffman's testimony. Also, Mr. Hoffman had no first-hand knowledge about shootings.
	<i>Natasha on Morris's involvement:</i> Morris shot the truck with a shotgun ¹⁹³
	<i>Natasha on James's involvement:</i> James didn't shoot the truck. ¹⁹⁴
	<i>Lindell on who shot Dennis or Thomas:</i> Not James, as Lindell excluded him as the red-shirted shooter during FBI-administered line-up. ¹⁹⁵
	<i>Lindell on who shot the truck (and him) with a shotgun:</i> Morris. ¹⁹⁶

¹⁸⁹ ECF No. 717 at 821 (Transcript-Day 5).

¹⁹⁰ ECF No. 717 at 917 (Transcript-Day 5).

¹⁹¹ ECF No. 717 at 821 (Transcript-Day 5).

¹⁹² ECF No. 717 at 821 (Transcript-Day 5).

¹⁹³ ECF No. 717 at 1039 (Transcript-Day 5).

¹⁹⁴ ECF No. 717 at 1032 (Transcript-Day 5).

¹⁹⁵ ECF No. 725 at 1114 (Transcript-Day 6).

¹⁹⁶ ECF No. 725 at 1114 (Transcript-Day 6).

1 These scales are imbalanced, and not in a way that helps the Government. Faced with
2 all these facts from the Government's *own witnesses*, we are nowhere close to near
3 certitude, which is why the Government provided insufficient evidence to sustain the
4 verdict on the truck murders.

5 **2. Under Rule 33, the Government failed to prove James committed the**
6 **truck murders with near certitude.**

7 Under Rule 33's more-relaxed standard, things get much worse for the
8 Government, as now the Court gets to weigh in on evidence, including who testified
9 more truthfully—Morris or Natasha. Because boiled down, that's what it comes down
10 to: Morris claims James shot the truck as it drove away; Natasha said he didn't. Two
11 different Government witnesses saying two different things.

12 To resolve this conflict under Rule 33, the Court gets to consider Morris's
13 credibility, which we covered above. But it also gets to weigh Natasha's credibility. In
14 doing so, the Court considers that when Natasha exculpated James in the truck
15 shooting, she also inculpated Morris—*her own uncle*; it considers when Natasha
16 confirmed her comments about James and Morris “were true”—her literal last words
17 under oath;¹⁹⁷ it considers when Lindell corroborated Natasha by also identifying
18 Morris as a shooter; it considers when Lindell corroborated Natasha by also excluding
19 James as a shooter; and it considers when Natasha testified she wasn't messed up from

¹⁹⁷ ECF No. 717 at 1042-43 (Transcript–Day 5).

1 the drugs and alcohol she used that day, but Morris was “pretty hyped up” from the
2 alcohol, meth, and cocaine he consumed during his all-nighter.¹⁹⁸

3 Beyond the evidentiary and credibility shortfalls above, another fact supports a
4 new trial under Rule 33 on the truck murders: an evidentiary error. During closing, the
5 Government told the jury Morris saw James shoot Tommy:¹⁹⁹

6 19 And you'll recall that, by that time, she testified that
7 20 James was shirtless. So the evidence shows that at this time,
8 21 Morris had a blue shirt; Donovan, a white tank top. And who
9 22 does that leave? It leaves the defendant. It leaves the
23 23 defendant, who Morris Jackson testified he saw shoot Tommy.

10 That's false. Morris admitted on cross he didn't see anyone get shot (i.e., Thomas,
11 Dennis, or otherwise);²⁰⁰ instead, he told the jury the Clouds shot at the truck as it
12 pulled away (i.e., *after* Dennis and Thomas were shot).²⁰¹ He also didn't say what gun
13 James purportedly had.²⁰² These are subtle, but critical distinctions that leave the
14 Government's claim unsupported in the record.

15
16
17 ¹⁹⁸ Under Rule 33, the Court also needs to weigh Mr. Hoffman's testimony. Considering half of
18 what Mr. Hoffman told the jury (James shot a woman in arm) is verifiably incorrect, his credibility
leaves something to be desired. No, the true credibility contest is between Morris and Natasha.

¹⁹⁹ ECF No. 775 at 1660 (Transcript-Day 9).

²⁰⁰ ECF No. 717 at 917 (Transcript-Day 5).

²⁰¹ ECF No. 717 at 821 (Transcript-Day 5).

²⁰² ECF No. 717 at 821 (Transcript-Day 5).

But after a timely objection for misstating testimony, the Court overruled it, empowering the Government to double-down on this falsehood:²⁰³

22 does that leave? It leaves the defendant. It leaves the
 23 defendant, who Morris Jackson testified he saw shoot Tommy.
 24 MR. McENTIRE: Objection. That also misstates the
 25 testimony.

KIMBERLY J. ALLEN, CRR, RPR, CSR
 OFFICIAL COURT REPORTER

USA v. Cloud/1:19-cr-2032-SMJ-1
 Jury Trial/Day 9, Volume IX/ March 8, 2022
 Government Closing Argument

1661

1 THE COURT: Hold on.
 2 Just one second, Counsel.
 3 (Counsel conferring.)
 4 THE COURT: The Court's going to overrule that objection.
 5 Go ahead.
 6 MR. BURSON: So Morris sees the defendant shoot Tommy,
 7 according to Morris' testimony.

This error harmed James in two ways:

First, it allowed the Government to connect James to Thomas's death in a way unsupported by the evidence; and

²⁰³ ECF No. 775 at 1661 (Transcript-Day 9).

1 *Second*, by overruling James's objection, the Court effectively vouched for the
 2 Government, finding its read on the evidence to be the right one. The Court's ruling
 3 would hurt less if it instructed the jury to rely on its own memory, as it did the last time
 4 James objected to the Government misstating evidence.²⁰⁴

5 14 THE COURT: Ladies and gentlemen, you are to disregard
 6 15 the statement that counsel indicated, "She," Natasha, "also
 7 16 recalls seeing Morris Jackson walk in that direction too, but
 8 17 she does not recall if she [sic] was armed."
 9 18 That misstates the testimony. But, again, I'd ask you to
 10 19 remember the testimony of the witnesses, and it is your memory
 11 20 that controls.
 12 21 All right. Go ahead, Counsel.

13 But the Court didn't provide a similar cautionary instruction when overruling James's
 14 objection, which imbued the Government's double-down with extra credibility.

15 Given all this evidence (from the Government's own witnesses), the weight of
 16 the evidence goes against the verdict on the truck murders.

17 3. **Under Rule 29, the Government failed to prove James aided in the** 18 **truck murders with near certitude.**

19 As stated above, the Government never mentioned the words "aiding" or
 20 "abetting" during closing until it started talking about the carjacking at Jon's house.
 21 Without guidance from the Government, James (and the Court) are left to guess what

²⁰⁴ ECF No. 775 at 1659 (Transcript-Day 9).

1 facts show James aided the truck murders. At best, the Government has Morris's
 2 testimony, which includes James purportedly telling Morris to shoot anyone that came
 3 down the driveway.²⁰⁵ That statement *could* help the Government clear Rule 29's
 4 hurdle on the truck murders...if it was uncontroverted.

5 But it wasn't. Natasha said otherwise, hearing Donovan declare they should
 6 "take out the people in the black truck"; she also heard James's response: "No
 7 fucker!" telling Donovan to calm down. This exchange speaks volumes, as it showed
 8 the Clouds didn't share a "state of mind extending to the entire crime," which is what
 9 the Supreme Court looks for. *Rosemond v. U.S.*, 572 U.S. 65, 75-76 (2014). Quite the
 10 opposite: minutes before Dennis and Thomas are shot, James told Donovan to calm
 11 down, which infuriated Donovan more. We're back to evidentiary equipoise (Morris
 12 saying one thing, Natasha saying another), which doesn't clear Rule 29's deeper audit.

13 **4. Under Rule 33, the Government failed to prove James aided in the**
 14 **truck murders with near certitude.**

15 Once again, things get worse for the Government under Rule 33's more-relaxed
 16 standard, as the Court gets to weigh in on Morris and Natasha's testimony. Morris
 17 claims James wanted to shoot the truck and worked with Donovan to do so; Natasha
 18 said the Clouds fought over shooting the truck. Once again, two Government witnesses
 19 saying two different things.

²⁰⁵ ECF No. 700 at 790 (Transcript-Day 4).

1 We covered this conflict above, and the result remain unchanged: Natasha is
2 credible, Morris is not.

3 Beyond the evidentiary and credibility shortfalls above, another fact supports a
4 new trial under Rule 33 on the truck murders: an evidentiary error. Some context helps:

5 Since the Government formally charged James with aiding in the truck murders,
6 he needed to educate the jury about the various times on June 8 that he and Donovan
7 weren't on the same page. To that end, James called FBI Special Agent Jennifer
8 Terami to discuss an interview she had with Laura Tulee, a witness who passed away
9 between the June 8 shootings and trial. During that interview, Ms. Tulee advised Agent
10 Terami of the following: 1) she saw the Clouds on June 8, 2019, after the shootings at
11 Medicine Valley; 2) the Clouds wanted to borrow her car; and 3) when Ms. Tulee said
12 "no," Donovan became aggressive and wanted to take the car, as well as Ms. Tulee;
13 and 4) James stopped Donovan from doing so.

14 James attempted to elicit this evidence during Agent Terami's direct, but the
15 Government objected on hearsay grounds—an objection the Court sustained.²⁰⁶ James
16 asked the Court to reconsider its ruling on four grounds: 1) James didn't offer these
17 statements for the truth, but rather to show what effect these statements had on James,
18 which is a "common" exception to the hearsay rule²⁰⁷; 2) James telling Donovan "no"

19 _____
²⁰⁶ ECF No. 739 at 1403-04 (Transcript-Day 7).

²⁰⁷ ECF No. 724 at 2 (Bench Brief on Laura Tulee).

1 isn't hearsay because it's an imperative statement²⁰⁸; 3) no double hearsay issues
 2 existed because the statements weren't offered for the truth²⁰⁹; and 4) even if this
 3 statements were hearsay, they were admissible under Rule 807's hearsay catch-all.²¹⁰

4 The Court declined to reconsider its ruling, which kept James's reaction to Donovan's
 5 aggression from the jury.²¹¹ This error harmed James because it prevented him from
 6 showing the jury other examples throughout June 8 when he and Donovan weren't on
 7 the same page. It's not a pivotal moment, but it does play into the Rule 33 calculus.

8 Given all this evidence (from the Government's own witnesses), the weight of
 9 the evidence goes against the verdict that James aided in the truck murders.

10 IV. Conclusion

11 James Cloud is many things, but a killer isn't one of them.

12 Dated: May 6, 2022.

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18 ²⁰⁸ ECF No. 745 at 4 (Motion to Reconsider on Laura Tulee).

19 ²⁰⁹ ECF No. 745 at 5 (Motion to Reconsider on Laura Tulee).

²¹⁰ ECF No. 745 at 5 (Motion to Reconsider on Laura Tulee).

²¹¹ ECF No. 764 at 1495 (Transcript-Day 8).

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Service Certificate

I certify that on May 6, 2022, I electronically filed the foregoing with the Clerk
of the Court using the CM/ECF System, which will notify Assistant United States
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